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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

In re ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner.*

ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF MANDAMUS

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(CAPITAL CASE)

QUESTIONS PRESENTED

1. Does the Ninth Circuit have jurisdiction to recall its mandate in a capital habeas case which is already final, when that action results in the relitigation of the same claims on the same facts in contravention of 28 U.S.C. § 2244(b)(1)?

2. Did the Ninth Circuit clearly abuse its discretion in granting a recall of the mandate because of a possible miscarriage of justice predicated on the ground that two of its judges mistakenly believed they did not have the ability to request en banc rehearing following the panel's modification of its decision?

3. Did the Ninth Circuit clearly abuse its discretion in granting a recall of the mandate in a capital case because six members of an en banc panel disagree with the decision reached by the unanimous three judge panel?

LIST OF PARTIES

Arthur Calderon, Warden, California State Prison at San Quentin, is the Petitioner in this Petition for Writ of Mandamus.

The United States Court of Appeals for the Ninth Circuit issued a published order which is the subject of this request for review.

Thomas M. Thompson, a condemned state inmate scheduled to be executed on August 5, 1997, pursuant to judgment of death by the State of California, is the real party in interest in the underlying proceeding.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

No.

In re ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN, *Petitioner*.

CITATIONS OF OPINIONS AND ORDERS

Thomas M. Thompson v. Arthur Calderon, Unpublished Order by the United States District Court for the Central District of California, denying Thompson's motion for relief from judgment in Case Number CV-89-3630-DT, filed July 25, 1997.

Thomas M. Thompson v. Arthur Calderon, ___ F.3d. ___ (9th Cir. 1997), published order issued by the Ninth Circuit Court of Appeals on July 28, 1997, denying Thompson's motion to withdraw the mandate.

Thomas M. Thompson v. Arthur Calderon, ___ F.3d ___ (9th Cir. 1997), published order issued by the Ninth Circuit Court of Appeals on July 30, 1997, ordering rehearing en banc of the denial of the motion for mandate, and ordering oral argument on the merits of the claims raised in Thompson's first habeas corpus petition.

Thomas M. Thompson v. Arthur Calderon, ___F.3d ___(9th Cir. 1997) published order of the Ninth Circuit Court of appeals on August 3, 1997, recalling the mandate in Thompson v. Calderon, 86 F.3d 1509, modified, 109 F.3d 1358 (9th Cir. 1997), cert. denied, Thompson v. Calderon, ___ U.S. ___, ___ S. Ct. ___, 138 L. Ed. 2d 188 (1997).

STATEMENT OF JURISDICTION

On August 3, 1997, less than 36 hours before the scheduled execution of Thomas M. Thompson, the Ninth Circuit Court of Appeals issued a published order in Thomas M. Thompson v. Arthur Calderon, in Case Numbers 95-99014 and 95-99015, ordering its mandate recalled, vacating the unanimous three judge panel's decision and affirming the district court's grant of habeas relief as to the rape conviction, rape special circumstance, and vacating the sentence of death; remanding for further proceedings in the district court regarding the first degree murder conviction, and ordered the State to vacate its execution order. Under the All Writs Act, 28 U.S.C. § 1651(a), and the Rules of the United States Supreme Court, Rule 20, this Court has the power to issue a writ of mandamus to correct the illegal action of the Ninth Circuit and its clear abuse of discretion in precluding the State of California from proceeding with the scheduled execution of Thomas Thompson.[1]

RELEVANT STATUTES

Section 2244(b) as amended by the AEDPA provides:

> (b)(1) A claim presented in a second or successive habeas corpus application under

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1. 28 U.S.C. § 1651(a) provides:

> The Supreme Court and all courts established by Act of Congress may issue writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

> section 2254 that was presented in a prior application shall be dismissed.
>
> (b)(2) A claim presented in a second or successive habeas application that was not presented in a prior application shall be dismissed unless -
>
> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (B)(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (3)(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (3)(C) The court of appeals may authorize the filing of a second or successive application only if it determined that the application makes a prima facie showing that the applicant satisfies the requirements of this subsection.

(3)(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(3)(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claims satisfies the requirements of this section.

STATEMENT OF THE CASE

In November of 1983, following a trial by jury, Thomas Thompson, was convicted of raping and personally murdering 20-year-old Ginger Fleischli on September 12, 1981, and sentenced to death. Following an automatic appeal, the California Supreme Court affirmed the judgment of conviction and sentence of death. People v. Thompson, 45 Cal. 3d 86, 246 Cal. Rptr. 245, 753 P.2d 37 (1988), cert. denied, Thompson v. California, 488 U.S. 960, 109 S. Ct. 404, 102 L. Ed. 2d 392 (1988).

On January 16, 1990, Thompson filed a Petition for Writ of Habeas Corpus with the United States District Court for the Central District of California (hereinafter "district court"). On March 29, 1995, the district court entered an order denying Thompson's Petition for Writ of Habeas Corpus as to his conviction for first degree murder and granting the petition as to Thompson's conviction for rape and the rape special circumstance finding, thereby vacating the sentence of death.

Both parties appealed to the Court of Appeals for the Ninth Circuit. On June 19, 1996, the Honorable Robert R. Beezer, Cynthia Holcomb Hall, and Edward Leavy, Circuit Judges, issued a unanimous decision reversing the district court's partial grant of habeas relief and affirming the district court's partial denial of habeas relief, after concluding the district court's grant of habeas relief based on ineffective assistance of counsel was erroneous in light of Thompson's failure to show prejudice. Thompson v. Calderon, 86 F.3d 1509 (9th Cir. 1996).

Thompson filed a timely Petition for Rehearing and Suggestion for Rehearing en banc in the Ninth Circuit. On March 6, 1997, the Opinion filed on June 19, 1996, was amended without altering the outcome and, except for the amendments, Thompson's Petition for Rehearing was denied. Judges Hall and Leavy voted to reject the Suggestion for Rehearing en banc, and Judge Beezer recommended the rejection of the Suggestion for Rehearing en banc. After being advised of the Suggestion for Rehearing en banc, no judge in active service in the Ninth Circuit requested a vote to rehear the matter en banc. Thompson v. Calderon, 109 F.3d 1358 (9th Cir. 1996).

On April 21, 1997, Thompson filed a Petition for Writ of Certiorari in this Court. On June 2, 1997, this Court denied the petition. Thompson v. Calderon, ___ U.S. ___, ___ S. Ct. ___, 138 L. Ed. 2d 188 (1997).

The Ninth Circuit issued its mandate on June 11, 1997.

On June 20, 1997, the state trial judge from Thompson's 1983 criminal trial, the Honorable Robert Fitzgerald, held a public session in Orange County Superior Court and ordered that Thompson be put to death at the California State Prison on August 5, 1997.

On July 3, 1997, Thompson filed his fourth Petition for Writ of Habeas Corpus in the California

Supreme Court in Case Number S062592, raising three claims: (1) newly discovered evidence of actual innocence; (2) suppression of evidence of his innocence by the prosecution for 15 years; and (3) misconduct by a juror during voir dire which deprived him of a fair trial. On July 16, 1997, the California Supreme Court denied Thompson's three claims on the merits, and his third claim was also denied on procedural grounds, as "untimely" and "substantially delayed without good cause." July 16, 1997, Order, citing In re Clark, 5 Cal. 4th 750, 21 Cal. Rptr. 2d 509, 855 P.2d 729 (1993); and In re Swain, 34 Cal. 2d 300, 209 P.2d 793 (1949).

On July 23, 1997, Thompson filed a motion pursuant to Fed. R. Civ. P. Rule 60(b) in the district court for relief from judgment entered in his first federal habeas proceeding.

On July 23, 1997, Thompson filed a motion to recall the mandate and for a stay of Thompson's August 5, 1997, execution date in the Ninth Circuit.

On July 25, 1997, the district court issued an Order denying the motion based on lack of jurisdiction, and alternatively, on the grounds that Thompson's claims constituted an abuse of the writ and his execution would not be a miscarriage of justice.[2]

On July 28, 1997, Thompson filed a Notice of Appeal, and the district court issued a Certificate of Probable Cause for the sole purpose of facilitating Thompson's access to the Ninth Circuit, as opposed to making any finding supporting the issuance of a Certificate of Probable Cause.

On July 28, 1997, the Ninth Circuit issued an Order denying the Motion to Recall the Mandate and Stay of Execution without prejudice to any other proceedings.

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2. Respondent has previously lodged copies of the district court's and Ninth Circuit's orders with this Court.

On July 30, 1997, Thompson filed a Petition for Rehearing and Suggestion for Rehearing en banc. That same day, prior to receiving written opposition from Respondent, the Ninth Circuit granted Thompson's request to rehear the denial of Thompson's motion to recall the mandate en banc.

On July 31, 1997, the Governor of California issued a written decision denying Thompson's Request for Clemency expressly rejecting Thompson's claim of innocence.

The en banc panel heard oral argument on Friday August 1, 1997, on Thompson's motion to recall the mandate.

On Sunday August 3, 1997, at approximately 3:30 p.m., the Ninth Circuit issued an opinion wherein the en banc panel majority recalled the mandate in Thompson's first habeas corpus proceeding, vacated the unanimous three judge opinion in the case, affirmed the district judge's partial grant of habeas corpus relief as to Thompson's rape conviction, rape special circumstance, and vacated the death sentence; remanded the case to the district court for further proceedings regarding Thompson's request for habeas relief on his conviction for first degree murder; and ordered the State to vacate its execution order.

REASONS FOR GRANTING WRIT

Ignoring the fact that it has lost lawful authority over Thompson's appeal in his first habeas proceeding, (See Thompson v. Calderon, 86 F.3d 1509 (9th Cir. 1996), modified, 109 F.3d 1358 (9th Cir. 1996), cert. denied, Thompson v. Calderon, ___ U.S. ___, ___ S. Ct. ___, 138 L. Ed. 2d 188 (1997), six judges of the Ninth Circuit Court of Appeals have contravened the statutory mandate of the Antiterrorism and Effective Death Penalty Act of 1996

(AEDPA) by allowing the same habeas claims based on the same record to be revisited in the eleventh hour in a capital case. 28 U.S.C. § 2244(b)(1) clearly precludes a federal intermediate appellate court from revisiting habeas claims already litigated in a first petition which is final. Since the Ninth Circuit's authority over state habeas petitions is limited to that granted it by Congress (See Felker v. Turpin, ___ U.S. ___, 116 S. Ct. 2333, ___ L. Ed. 2d ___ (1996)), the en banc majority's recall of the mandate in order to further litigate Thompson's first federal habeas proceeding is in excess of the Ninth Circuit's jurisdiction and represents an illegal order.

Additionally, even independent of the unique laws which govern, and necessarily supersede the Ninth Circuit's inherent power to recall its mandate, the en banc majority has clearly abused its discretion. While the en banc majority claims to have found "extraordinary circumstances" justifying the recall of the mandate, there are no such circumstances present in this case. Indeed, there is not even a basis for having granted en banc review in a timely manner, as there was no need to resolve conflicting authority present in the case, and no question of exceptional importance. See Fed. R. App. P. Rule 35; Ninth Circuit Rule 35-1.

The en banc majority concludes that since two judges failed to request en banc review in a timely manner because of a mistaken belief they could not do so, a possible miscarriage of justice may occur due to the denial of Thompson's right to en banc review. The failure of two judges of an intermediate circuit court to request en banc rehearing in a capital case in a timely manner hardly constitutes a basis for the reversal of capital case less than 36 hours before a scheduled execution. The actions of the en banc majority of the Ninth Circuit offend every notion of finality in our jurisprudence, all concept of due process, and serves only to foster disrespect for a criminal justice system that permits six federal judges to undo 16 years of

litigation in state and federal courts that have made a final determination, in accordance with all laws and procedures, that Thomas M. Thompson received a fair trial, and his execution is not a miscarriage of justice. Ginger Fleischli was raped and brutally murdered by Thomas Thompson on September 12, 1981. This Court should not permit her to be victimized once again, 16 years later. See Engle v. Issac, 456 U.S. 107, 128, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982).

In light of the illegal actions and clear abuse of discretion by the Ninth Circuit, and the untenable manipulation of the federal courts denying California's sovereign power to proceed with the execution of Thompson on August 5, 1997, mandamus is the appropriate means for Petitioner Calderon to seek immediate relief from this Court. See Schlagenhauf v. Holder, 379 U.S. 104, 110, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964).

ARGUMENT

THIS COURT SHOULD VACATE THE EN BANC MAJORITY'S ORDER RECALLING THE MANDATE IN THOMPSON'S FIRST HABEAS PETITION IN ORDER TO PREVENT A MANIFEST ABUSE OF DISCRETION FROM PRECLUDING CALIFORNIA FROM PROCEEDING WITH THE LAWFUL EXECUTION OF THOMAS THOMPSON

There is no justification in law or equity for the Ninth Circuit's Order halting the execution of Thomas M. Thompson. Thompson's guilt and punishment have been exhaustively litigated in the state and federal courts for approximately 16 years. He has been heard by the California Supreme Court no less than five times. Thompson amended his federal habeas petition three times, and the federal courts litigated his habeas claims for no less than eight years. It would be a gross miscarriage of justice to allow six judges of the Ninth Circuit Court of Appeals to now preclude the execution of Thomas Thompson scheduled for August 5, 1997.

Ironically, the Ninth Circuit notes it has "long recognized the power to recall the mandate as a means of protecting the integrity of our processes and decisions." Slip Op. at 3, citing Perkins v. Standard Oil Co., 487 F.2d 672, 674 (9th Cir. 1973). The Order of the Ninth Circuit revisiting a final decision simply because a majority of an en banc panel would not presently agree with the three judge's panel's decision in the case has absolutely nothing to do with upholding the integrity of the judiciary. To the contrary, it calls into question the integrity of the judiciary.

The Ninth Circuit observes that this Court will only review a decision to recall the mandate for an abuse

of discretion. (Slip Op. at 3-4.) Unquestionably, the Ninth Circuit's opinion represents an abuse of discretion, and is in complete contravention of its lawful authority to act regarding habeas corpus relief. Its opinion recalling the mandate should be immediately vacated by order of this Court, thereby vacating all further action taken by the en banc panel that has resulted in the State being precluded from proceeding with the scheduled execution on August 5, 1997.

When habeas petitioners have sought to pursue habeas relief after litigating a first federal petition on the merits, without filing a second or successive petition, those efforts have properly been deemed to be subject to the limitations on second or successive habeas petitions. See Bonin v. Calderon, 59 F.3d 815, 847 (9th Cir. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 718, 133 L. Ed. 2d 671 (1996). Indeed, when inmates have filed Fed. R.Civ. P. Rule 60(b) motions for relief from judgment entered in first habeas petitions, those motions have been deemed the functional equivalent of second or successive habeas petitions. See In re Medina, 109 F.3d 1556 (11th Cir. 1997); Felker v. Turpin, 101 F.3d 657 (11th Cir. 1996), cert. denied, ___ U.S. ___, 117 S. Ct. 451 (1996); McQueen v. Scroggy, 99 F.3d 1302, 1334 (6th Cir. 1996). The Ninth Circuit can no more recall a mandate without compelling a habeas petitioner to comply with the AEDPA, than the district court can grant a Rule 60(b) motion for relief from judgment without requiring the habeas petitioner to comply with the AEDPA. See Clark v. Lewis, 1 F.3d 814, 825-826 (9th Cir. 1993).

The en banc majority notes that it has not acted because of any new evidence presented by Thompson, nor because of any "second or successive claim for relief." (Slip Op. at 5.) Apparently, by allowing Thompson to relitigate his original claims on the original record from the district court proceedings which were the basis for his appeal, the Ninth Circuit believes it has avoided any

necessity of Thompson satisfying the requirements of the AEDPA for habeas corpus litigation subsequent to a first federal petition. Nothing could be further from the truth.

Thompson's Motion to Withdraw the Mandate in the Ninth Circuit and Motion for Relief from Judgment in the district court are thinly veiled attempts to evade the restrictions that control whether or not he can be heard again in federal court at this juncture. See Felker v. Turpin, ___ U.S. at ___, 116 S. Ct. at 2333, ___ L. Ed. 2d at ___. The en banc majority's opinion in response to the motion to withdraw the mandate is contrary to the AEDPA. The Ninth Circuit's jurisdiction to afford Thompson habeas relief is based solely in the statutory authority provided by Congress. Since the AEDPA clearly provides for the dismissal of any claim in a successive petition that was presented in a prior application for writ of habeas corpus, without exception, the Ninth Circuit's order is not only contrary to justice, and due process, it is in direct contravention with its limited authority to issue habeas corpus relief. 28 U.S.C. § 2244(b)(1).

The en banc majority attempts to distinguish its decision Nevius v. Sumner, 105 F.3d 453, 461 (9th Cir. 1996), wherein it held a motion to recall the mandate could not be used to evade the provisions of the AEDPA, by observing that it retains the authority to recall the mandate to correct an erroneous decision that would result in a manifest injustice. Whatever the label, the action remains the same. The en banc majority is acting in direct contravention of the AEDPA. Moreover, the only manifest injustice is the one created by the en banc majority's order.

While the Ninth Circuit has observed that it will exercise its power to recall its mandate when "exceptional circumstances" are present (Greenawalt v. Stewart, 105 F.3d 1268, 1276 (9th Cir. 1997), cert. denied, 117 S.Ct. 794 (1997)), it is readily apparent that no such "exceptional circumstances" are present here. Accordingly, even

separate and apart from the limits of the AEDPA, the en banc panel has absolutely no basis for recalling the mandate in Thompson's first habeas proceeding.

The first "exceptional" circumstance cited by the Ninth Circuit en banc majority is "our normal en banc process did not function in the intended manner." (Slip Op. at 4.) In support of this circumstance, the en banc majority cites to nothing "exceptional" in terms of whether or not justice has been served. Rather, an internal misunderstanding is referenced wherein two judges apparently misunderstood and erroneously believed they were precluded from making an en banc call at the time the three judge panel modified its decision. (Slip Op. at 5.) "A series of misunderstandings" by two judges of the court hardly equates with the right to ignore concepts of finality, due process and justice in a capital case that has already been adjudicated in state and federal courts for almost 16 years. (See Slip Op. [Kozinski, J., dissent.])

Remarkably, the en banc majority notes that it considered making a sua sponte request for en banc consideration of whether to recall the mandate even before the mandate was spread in the district court, but "through a consultative process, the court decided to postpone action on whether sua sponte to recall the mandate until after Thompson concluded his state court habeas proceedings and filed a further request for review" with the Ninth Circuit. (Slip Op. at 6.) The decision to delay action by the Ninth Circuit is indistinguishable from the conduct of litigants engaging in eleventh-hour manipulations, and should receive the same response from this Court. See Herrera v. Collins, 506 U.S. 390, 425-426, 113 S. Ct. 853 (1993).

Ironically, the en banc majority cites the following in support of its actions:

"The [Supreme] Court has accordingly imposed a series of unique substantative and procedural restrictions designed to ensure that capital punishment is not imposed with the serious and calm reflection that ought to precede any decision of such gravity and finality." Thompson v. Oklahoma, 487 U.S. 815, 856, 108 S. Ct. 2687, 101 L. Ed. 2d 702 (1988) (O'Connor, J., conc.):

The substantative and procedural restrictions referenced in Thompson, have all been met in this case. What is wrong is that the Ninth Circuit has decided to act independent of the serious and calm reflection that has already preceded the decision of California's jury and courts by allowing six federal intermediate appellate judges to become the final judge and jury in this matter.

The en banc panel suggests the eleventh-hour nature of its opinion is not problematic because Thompson is not responsible for the "lateness of the hour." (Slip Op. at 7.) It matters little to the State whether the Ninth Circuit accepts responsibility for this untenable eleventh-hour departure from law and procedure. The en banc majority's order remains an absolute injustice, whatever its origins.

The en banc majority shows a fundamental misapprehension of what constitutes a miscarriage of justice. If internal procedures denied Thompson en banc review by the Ninth Circuit, that is clearly not a miscarriage of justice. At the eleventh hour, the law clearly defines a miscarriage of justice as the execution of an innocent man. The en banc majority's concern that the panel's decision "may result in a miscarriage of justice" ignores the fact that this Court has already reviewed that decision and denied certiorari.

While the en banc majority label the district court's decision "as thorough and well reasoned" it ignores the clear error in its decision, as identified by the

unanimous three judge panel, and affirmed by this Court. Moreover, the en banc majority ignore the fact that the State appealed the district court's decision on the ground it had been denied due process during the evidentiary hearing conducted in that court. The en banc majority has no right to embrace the district court's erroneous ruling at the eleventh hour, and transform a condemned man's conviction to, at best first degree murder, without special circumstances, less than 36 hours before his execution. See Slip. Op., [Kleinfeld, J., dissent. [re: trepidation as last minute aspect of proceeding prevents en banc judges from mastering the record].)

The second "exceptional" circumstance relied upon by the Ninth Circuit en banc majority is that the three judge panel made "fundamental errors of law" which will lead to a miscarriage of justice if not corrected. (Slip Op. at 5.) In an effort to justify the bald assertion of "fundamental errors of law" the opinion of the Ninth Circuit en banc majority relates to matters more appropriately addressed in a clemency decision, than by a court in the eleventh hour before an execution:

> The consequences of our failure to act would be the execution of a person as to whom a grave question exists whether he is innocent of the death-qualifying offense, the alleged rape, and whose conviction on the first-degree murder charge may be fundamentally flawed. This is a person who has never before been convicted of a crime. Under these circumstances, we have an obligation to recall the mandate in order to preserve the integrity of the judicial process.

(Slip Op. at 5.)

To the contrary, the Ninth Circuit en banc majority has the obligation to follow the law, which includes refusing to allow state condemned inmates to

manipulate the federal courts into frustrating the State's sovereign power to punish its offenders. Gomez v. United States District Court for the Northern District of California, 503 U.S. 653, 112 S. Ct. 1652, 118 L. Ed. 2d 293 (1992). The six judges of the Ninth Circuit conveniently ignore the exhaustive litigation that has proceeded their order. Rather than preventing a miscarriage of justice, the en banc majority is itself creating a miscarriage of justice, as the judicial system does not belong solely to Thomas Thompson. The State of California is entitled to due process of law and fundamental fairness as well. Indeed, the en banc majority ignores the limited role of habeas corpus altogether. As this Court has observed in upholding the denial of a stay of execution:

> The role of federal habeas proceedings, while important in assuring that constitutional rights are observed is secondary and limited. Federal courts are not forums in which to relitigate state trials. Even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely.

Barefoot v. Estelle, 463 U.S. 880, 887, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).

The en banc majority has gone one step beyond the relitigation of state trials precluded in Barefoot, to relitigating the state trial, after the habeas proceeding has already become final. This Court should not permit such a flagrant abuse to preclude Thompson's scheduled execution.

Rather than presenting any "extraordinary circumstances" there is absolutely nothing in the three judge panel decisions that would even justify en banc rehearing, as there was no need to resolve conflicting authority present in the case, and no question of

exceptional importance. See Fed. R. App. P. Rule 35; Ninth Circuit Rule 35-1. If the Ninth Circuit is permitted to withdraw its mandate in this case, the door will be opened to endless federal habeas litigation in capital cases.

CONCLUSION

Thompson has no factual or legal basis which could entitle him to habeas corpus relief at this juncture. If the Ninth Circuit recall of the mandate is permitted to remain in effect, the result is that the clock has been inexplicably turned back in a case that has already been adjudicated in state and federal courts for almost 16 years. The untenable anomaly from allowing a recall of the mandate after a first habeas petition is final is that the Ninth Circuit assumes the role of the court of last resort in the eleventh hour of capital cases. Such an anomaly is contrary to every concept of due process, finality of judgment, as well as the statutory authority which enables the Ninth Circuit to consider habeas corpus relief in the first instance. This Court should vacate the Ninth Circuit's order recalling the mandate, and thereby vacate every

action taken thereafter including ordering the State to vacate the execution of Thomas M. Thompson, and any further relief necessary to ensure that the lawful execution of Thomas M. Thompson proceeds as scheduled on August 5, 1997.

Dated: August 3, 1997.

Respectfully submitted,

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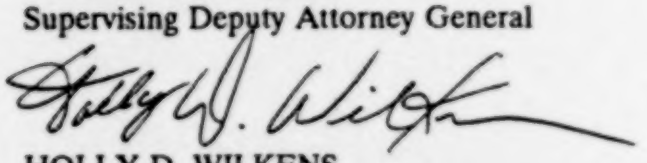

HOLLY D. WILKENS
Supervising Deputy Attorney General
Counsel of Record

Counsel for Petitioner

HDW:cjk

AFFIDAVIT OF SERVICE BY ELECTRONIC FACSIMILE

Attorney:	No. 97-197 October Term, 1996
DANIEL E. LUNGREN Attorney General of the State of California HOLLY D. WILKENS Supervising Deputy Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 P.O. Box 85266 San Diego, California 92186-5266	***In re* ARTHUR CALDERON, Warden,** **California State Prison at San Quentin,** Petitioner.

I, THE UNDERSIGNED, say: That I am a citizen of the United States; that I am 18 years of age or over; that I am employed in the County of San Diego, in which County the below-stated electronic facsimile transmission occurred; that I am not a party to the subject cause; that my business address is 110 West A Street, Suite 1100, San Diego, California 92101; that my electronic facsimile machine telephone number is (619) 645-2271; and that on August 3, 1997, I transmitted by electronic facsimile the within **Petition for Writ of Mandamus** to the below-named at the facsimile-machine telephone number indicated:

GREGORY A LONG, ESQ.
C/O ANDREW S LOVE, ESQ.
301 PENNSYLVANIA AVE
SAN FRANCISCO CA 94107
FAX (415) 920-3711
Counsel for Petitioner

Dated at San Diego, California, August 3, 1997.

Christine Kaul
CHRISTINE KAUL

AFFIDAVIT OF SERVICE BY ELECTRONIC FACSIMILE

Attorney:	No. 97-197 October Term, 1996
DANIEL E. LUNGREN Attorney General of the State of California HOLLY D. WILKENS Supervising Deputy Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 P.O. Box 85266 San Diego, California 92186-5266	***In re* ARTHUR CALDERON, Warden,** **California State Prison at San Quentin,** Petitioner.

I, THE UNDERSIGNED, say: That I am a citizen of the United States; that I am 18 years of age or over; that I am employed in the County of San Diego, in which County the below-stated electronic facsimile transmission occurred; that I am not a party to the subject cause; that my business address is 110 West A Street, Suite 1100, San Diego, California 92101; that my electronic facsimile machine telephone number is (619) 645-2271; and that on August 4, 1997, I transmitted by electronic facsimile the within **PETITION FOR WRIT OF MANDAMUS** to the below-named at the facsimile-machine telephone number indicated:

ESTELA URRUTIA CLERK
U S 9TH CIR COURT OF APPEALS
95 SEVENTH ST
SAN FRANCISCO CA 94103
FAX (415) 556-9721

Dated at San Diego, California, August 4, 1997.

STEPHEN MCGEE

AFFIDAVIT OF SERVICE BY MAIL

Attorney:	No. 97-197 October Term, 1996
DANIEL E. LUNGREN Attorney General of the State of California HOLLY D. WILKENS Supervising Deputy Attorney General 110 West A Street, Suite 1100 San Diego, California 92101 P.O. Box 85266 San Diego, California 92186-5266	***In re* ARTHUR CALDERON, Warden,** **California State Prison at San Quentin,** Petitioner.

I, THE UNDERSIGNED, say: I am a citizen of the United States, am 18 years of age or over, employed in the County of San Diego, in which County the below-stated mailing occurred, and not a party to the subject cause, my business address being 110 West A Street, Suite 1100, San Diego, California 92101.

I have served the within **PETITION FOR WRIT OF MANDAMUS** as follows: By placing one copy in a separate envelope addressed for and to each addressee named as follows:

GREGORY A LONG
SHEPPARD MULLIN RICHTER &
HAMPTON
333 S HOPE ST 48TH FLR
LOS ANGELES CA 90071
Counsel for Petitioner
and Attorney of Record

QUIN DENVIR
FEDERAL DEFENDER
801 K ST STE 1024
SACRAMENTO CA 95814
Counsel for Petitioner

ANDREW S LOVE
COFFIN & LOVE
301 PENNSYLVANIA AVE
SAN FRANCISCO CA 94107
Counsel for Petitioner

ESTELLA URRUTIA CLERK
U S 9TH CIR COURT OF APPEALS
95 SEVENTH ST
SAN FRANCISCO CA 94103

HON DICKRAN TEVRIZIAN
DISTRICT JUDGE
U S DISTRICT COURT CNTRL CAL
312 N SPRING ST G-8
LOS ANGELES CA 90012

MARY JAMESON CLERK
CALIFORNIA SUPREME COURT
SO TOWER 8TH FLR
303 2ND ST
SAN FRANCISCO CA 94107

CLERK OF THE COURT
FOR HON ROBERT R FITZGERALD
ORANGE CO SUPERIOR COURT
BOX 1994
SANTA ANA CA 92701

MICHAEL R CAPIZZI
DISTRICT ATTORNEY
COUNTY OF ORANGE
P O BOX 808
SANTA ANA CA 92702

CALIFORNIA APPELLATE PROJECT
ATTN LINDA LENKER
1 ECKER PLACE STE 400
SAN FRANCISCO CA 94105

Each envelope was then sealed and with the postage prepaid deposited in the internal mail collection system at this Office of the Attorney General, for deposit in the ordinary course of business in the United States Postal Service at San Diego, California, on the fourth day of August, 1997.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, August 4, 1997.

STEPHEN MCGEE

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ALL-PURPOSE ACKNOWLEDGMENT

State of California
County of San Diego } ss.

On 8/4/97 (DATE) before me, Christine J. Kaul, (NOTARY)

personally appeared Stephen McGee (SIGNER(S))

☒ personally known to me - OR- ☐ proved to me on the basis of satisfactory evidence to be the person(~~s~~) whose name(~~s~~) is/~~are~~ subscribed to the within instrument and acknowledged to me that he/~~she/they~~ executed the same in his/~~her/their~~ authorized capacity(~~ies~~), and that by his/~~her/their~~ signature(~~s~~) on the instrument the person(~~s~~), or the entity upon behalf of which the person(~~s~~) acted, executed the instrument.

PWR1 CHRISTINE I. KAUL Comm. # 1034176 NOTARY PUBLIC CALIFORNIA San Diego County My Comm. Expires July 31, 1998 PWR1

WITNESS my hand and official seal.

Christine Kaul
NOTARY'S SIGNATURE

OPTIONAL INFORMATION

The information below is not required by law. However, it could prevent fraudulent attachment of this acknowledgment to an unauthorized document.

CAPACITY CLAIMED BY SIGNER (PRINCIPAL)

☐ INDIVIDUAL
☐ CORPORATE OFFICER

_____
TITLE(S)

☐ PARTNER(S)
☐ ATTORNEY-IN-FACT
☐ TRUSTEE(S)
☐ GUARDIAN/CONSERVATOR
☐ OTHER: _____

SIGNER IS REPRESENTING:
NAME OF PERSON(S) OR ENTITY(IES)

_____

DESCRIPTION OF ATTACHED DOCUMENT

Affidavit of Service
TITLE OR TYPE OF DOCUMENT

2
NUMBER OF PAGES

8/4/97
DATE OF DOCUMENT

for Pet. for Writ of Mandamus
OTHER